U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 July 2007

Case No.: 2006-LHC-758

OWCP No.: 07-162603

In the Matter of:

M.B.
Claimant,

v.

TITAN MAINTENANCE & CONSTRUCTION COMPANY,
Employer,

and

LOUISIANA WORKERS' COMPENSATION CORPORATION,
Carrier,

APPEARANCES:

MARCUS J. POULLIARD, ESQ.,
On Behalf of the Claimant

DAVID K. JOHNSON, ESQ.
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),[1] brought by Claimant against Titan Maintenance & Construction Company (Employer) and Louisiana Workers' Compensation Corporation (Carrier).[2]

[1] 33 U.S.C. §§901-950.
[2] Hereinafter collectively referred to as Employer.

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 30 Jan 06. All parties were represented by counsel. On 13 Feb 07, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of
Claimant
Linda Allen

Exhibits
Claimant's Exhibits (CX) 1-41
Employer's Exhibits (EX) 1-6
Joint Exhibit (JX) 1[4]

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS[5]

1. Claimant's initial injury took place on 23 Oct 01, at the time and place as alleged.

2. That injury occurred in the course and scope of employment under conditions within the coverage of the Act.

3. Claimant was temporarily totally disabled from the date of his injury until at least 2 Apr 02.

4. Claimant's average weekly wage (AWW) was $583.13.

5. Employer has paid Claimant a total $11,242.95, of which $8,886.63 were disability compensation benefits.

[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] JX-1 is missing, but was reviewed on the record; Tr. 6-13.
[5] JX-1; Tr. 6-13.

FACTUAL BACKGROUND

Claimant was injured in October 2001 while working with a crew painting a ferry landing. He went to the hospital and was treated and released. He has never returned to his original job and after being seen by a number of doctors underwent surgery in 2003.

ISSUES & POSITIONS OF THE PARTIES

Employer/Employee Relationship

Employer Titan asserts that Claimant was never in its employ and it has no liability to him under the Act. Claimant responds that he was an employee of a subcontractor that Employer Titan engaged. Claimant argues that since the subcontractor failed to obtain the required insurance, Employer Titan is liable under the Act as the general contractor. Claimant also suggests that in the alternative he was a "borrowed employee" working for Employer Titan and it is liable.

Notice

Employer argues that it was not properly and timely informed of Claimant's injury. Claimant responds that he notified the Carrier and Employer's agent within the required time and that in any event, Employer has offered no evidence of prejudice relative to its investigation of the claim.

Choice of Physician

Employer submits that since Dr. Nelson was Claimant's physician of choice and he never sought authorization to change to Dr. Phillips or Dr. Adatto, it is not responsible for medical bills resulting from treating with them. Claimant answers that he never chose Dr. Nelson and that Dr. Phillips was always his choice of physician. Claimant argues that even if he had originally chosen Dr. Nelson, Employer's subsequent effective refusal for further medical care excused Claimant from the requirement to seek authorization.

Nature and Extent

Claimant argues that he has never been able to return to his original job and in the absence of any evidence of suitable alternative employment is totally disabled. He suggests that his disability turned from temporary to permanent on 7 Sep 04. Employer responds that Claimant was able to return to his original duties on 2 Apr 02 and suffered no disability after that time.

Medical Care

Employer argues that Claimant's failure to obtain authorization for treatment absolves it from liability for those expenses. Claimant responds that authorization was sought, but denied, and he no longer was obliged to seek authorization.

Employer also submits that the failure to submit reports within ten days of treatment insulates it from liability for that treatment. Claimant answers that Employer failed to show it suffered any prejudice from such failure.

LAW

Although the Act must be construed liberally in favor of the claimant,[6] the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,[7] which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[8]

In arriving at a decision in this matter, the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners.[9] If a physician's opinion is based on a claimant's subjective complaints and the claimant is not credible, then the physician's opinion is questionable.[10]

Employer Employee Relationship

The Act protects injured employees from uninsured subcontractors by imposing secondary liability on general contractors and deterring them from dividing work among smaller, uninsured entities.[11]

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation.[12]

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[6] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).
[7] 5 U.S.C. § 556(d).
[8] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).
[9] *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).
[10] *Director, Office of Workers' Compensation Programs [Roberson] v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65, 12 BRBS 344 (5th Cir. 1980), *aff'g* 8 BRBS 775 (1978).
[11] *Director, Office of Workers' Compensation Programs, U. S. Dept. of Labor v. National Van Lines, Inc.* , 613 F.2d 972, 986, (D.C. Cir. 1979).
[12] 33 U.S.C. § 904(a).

The Section 20 presumption does not apply to this issue and the burden is on the Claimant to establish a relationship which results in liability under the Act.[13]

Notice

The Act bars claims unless the claimant notifies the employer of his work related injury within thirty days of the date the claimant becomes aware of the relationship between the condition or accident at work and his injury.[14] However, there is a presumption of timely notice and to invoke the bar, the employer must prove with substantial evidence that it has been unable to effectively investigate some aspect of the claim by reason of the claimant's failure to provide timely notice as required by Section 12.[15] There is no timely notice and a claim will be barred if an employer is prejudiced by being unable to investigate an accident or provide medical treatment.[16]

Even if a claimant fails to provide a timely notice of injury under section 12, the resulting bar does not apply to a claim for medical benefits.[17]

Choice of Physician

According to Section 7(b) of the Act, Claimant "shall have the right to choose an attending physician . . . If due to the nature of the injury, the employee is unable to select his physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him."[18] Necessary immediate medical care contemplates severe injuries, unconsciousness, or other inability to select a physician.

After an initial choice of physician, a claimant may not change physicians without prior written consent of the employer or carrier.[19] An employer shall consent to a change in physician where claimant's initial free choice was not of a specialist whose services are necessary for and appropriate to, the proper care and treatment of the compensable injury.[20] Failure to obtain authorization for a change can be excused, however, where the claimant has been effectively refused further medical treatment.[21]

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[13] *See Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141 (1981).
[14] 33 U.S.C. § 12(a); *Thompson v. Lockheed Shipbuilding and Construction Co.*, 21 BRBS 94 (1988).
[15] 33 U.S.C. § 20(b); *Strachan Shipping Co. v. Davis*, 571 F.2d 968 (5th Cir. 1978), *Chase v. Bath Iron Works Corp.*, 22 BRBS 162 (ALJ) (1989) (employer has the burden of showing prejudice in order for a claim to be barred based on a lack of timely notice).
[16] *Addison v. Ryan-Walsh Stevedoring Company*, 22 BRBS 32 (1989); *Matthews v. Jeffboat, Inc.*, 18 BRBS 183, 187-188 (1986).
[17] *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Strachan Shipping Co. v. Hollis*, 460 F.2d 1108 (5th Cir.), *cert. denied*, 409 U.S. 887 (1972).
[18] 33 U.S.C. § 907(b).
[19] 33 U.S.C. § 907(c)(2).
[20] Id.
[21] *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 787 (D.C. Cir. 1984).

Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.[22]

An employer is liable for all medical expenses which are the natural and unavoidable result of a claimant's work injury. For medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary.[23] Medical care must also be appropriate for the injury.[24]

A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.[25] Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury.[26]

Medical providers must submit their reports of first treatment to the employer and the deputy commissioner within 10 days of the initial treatment, otherwise, employer's liability to pay for past medical expenses will cease.[27] The report must be filed within 10 days regardless of whether a claimant obtained pre-authorization or employer refused to provide treatment.[28] Employer must also demonstrate actual prejudice by the late delivery of the physician's report.[29] A failure to submit the initial report within 10 days of the first treatment may be excused for good cause.[30] However, it may only be excused by the director; the administrative law judge (ALJ) has no authority to waive this requirement.[31] The ALJ must still make a determination as to whether the initial medical reports were in fact untimely. Once an ALJ determines the initial reports are untimely, the case must be remanded to the district director for a determination of

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[22] 33 U.S.C. § 907(a); *Rowe v. Newport News Shipbuilding and Dry Dock Co.*, 193 F.3d 836 (4th Cir. 1999).
[23] *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).
[24] 20 C.F.R. § 702.402.
[25] *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984).
[26] *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988); *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984).
[27] 33 U.S.C. §907(d)(2); 20 C.F.R. §702.422; *Simmons v. Electric Boat Corp.*, 1994-LHC-01212 (Nov. 4, 1999); *Ravia v. Caleb Brett, et al*, 2004-LHC-01897 (May 24, 2005); *Toyer et al v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994); *Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992); *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994).
[28] 33 U.S.C. §907(d)(2).
[29] *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986)(Minimal delay in actual notice to Employer/Carrier held as good cause to excuse untimely report); *Simmons*, 1994-LHC-01212.
[30] 20 C.F.R. §702.422(b); *Simmons.*, 1994-LHC-01212; *Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981); *Roger's Terminal*, 784 F.2d 687.
[31] *Ravia*, 2004-LHC-01897; *Toyer*, 28 BRBS at 351-355; *Krohn*, 29 BRBS at 75; *Jackson v. Universal Maritime Service Corp., et al*, 31 BRBS 103 (1997).

whether there is good cause to excuse the failure to report.[32] No section 20 presumption applies and the burden of establishing that the reports were filed is on the claimant.[33]

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[34] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or permanent). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[35] Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.[36] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.[37] A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.[38] Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature.[39] However, an underlying permanent condition is not altered by a period of temporary disability due to a subsequent surgery.[40]

The question of extent of disability is an economic as well as a medical concept.[41] To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.[42]

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[32] *Toyer*, 28 BRBS at 351-355.
[33] *Jenkins*, 594 F.2d at 407.
[34] *Trask*, 17 BRBS at 56.
[35] 33 U.S.C. § 902(10).
[36] *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).
[37] *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).
[38] *Trask*, 17 BRBS at 60.
[39] *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.
[40] *Richmond v. Northrop Grumman Ship Systems*, BRB No. 06-0437 (Feb 27, 2007) (unpublished).
[41] *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).
[42] *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability.[43] Once a claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

EVIDENCE AND ANALYSIS

Testimonial Evidence

Claimant testified live in pertinent part that:[44]

> He was born on 9 Sep 57 and lives in Holden, Louisiana. He completed the eighth grade, but when he went into the ninth grade his father had a stroke and put him to work at a gas station. After two months, Claimant ran away from home and lived with his aunt. He went to work for CJ Marine as a deck hand. He tied up barges, made and broke tows, painted boats, and cleaned boats. He left CJ Marine and went to work for Rex Painting as a blaster/painter. He started as a helper and worked up to foreman. After that he worked for Brown and Root. He also drove trucks for a company named Vincent Transport. For a time he had his own personal home improvement company where he painted, did cabinetry, and renovations on older homes.
>
> Blasting and painting is sort of seasonal. If the weather's just right, usually around Christmastime to about February, it slacks off, so Claimant would work his painting company. There was never any period of time in his work history that he was off work for a considerable period of time. He has never drawn unemployment compensation.
>
> He also worked for Simco Coating, Poston's Industries, and Elder Offshore as blaster/painter. From Elder Offshore, he went to LA Tech as a blaster/painter foreman. He was hired about two months before his accident, towards the end of August. He made $15.50 an hour working, on average, 40 to 45 hours per week.
>
> He was hired by Jimmie Bullias, who was also his immediate supervisor. Mr. Bullias was an LA Tech employee. When he first started working for LA Tech he was at the Kostmayer yard preparing items that he eventually took to a ferry landing. There were big drive motors to install and some other equipment to weld and cut. His workplace was in the yard. They were blasting and painting the components in Kostmayer's yard. That went on about three weeks.
>
> Then the work location changed. Jimmie Bullias, Claimant's direct boss for LA Tech, told Claimant to take his crew out to the ferry and start working. Jimmie also said that Claimant was now employed by Titan Marine. Randy, the ramrod for Kostmayer, said the same thing. Claimant did not wonder or ask why he was suddenly working for Titan. He just went about his business and did his job. Claimant does not recall anybody who said

[43] *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).
[44] Tr. 23-64.

that they were a Titan employee tell him he was working for Titan. There was a gentleman that walked out there during the conversation Claimant had with Randy and Mr. Bullias. Claimant had never met him before, has never seen him again, and does not know his name. But, while he was there, Jimmie Bullias and Randy told Claimant if anybody asks, we work for Titan Marine.

Once Claimant went out onto the ferry, he took his orders from Randy. At that point he was receiving a computerized statement, like a check stub, that had Titan Maintenance on it along with his pay in cash. The stub had his withholdings on it.

A W-2 tax form from Administaff would actually be from Elder Offshore. He does not recall getting a W-2 from a company called Chailland, and does not recall anyone saying they were working for that company.

He was hurt when fell about 15 to 18 feet and landed on his buttocks. He tried to continue to work that morning but started getting really dizzy and throwing up. He got the shakes and sat down. He reported the accident to Mr. Bullias, who told him to go to a doctor or the closest emergency room and have the bill sent to Employer. Claimant went to Meadowcrest Hospital, where they took some x-rays of his back. They told him he needed to go see a specialist. Claimant contacted Mr. Bullias again and told him what happened at the hospital. He told Claimant to find a doctor and get it fixed. A friend recommended Dr. Phillips and Claimant called his office. They told Claimant he could have an appointment within two days. Mr. Bullias, said that was fine and Claimant should just find out how much it is and they would cut him a check, which they did.

Claimant went to see Dr. Phillips, who recommended an MRI. Mr. Bullias said it was starting to get expensive and decided to call the insurance company.

Not long after that, Claimant got some forms from Carrier in the mail. One of those forms was titled a choice of physician form. Claimant did not know exactly how to fill that out. He called to ask how to fill them out and talked to Colleen. He believes he talked to Colleen after going to Dr. Phillips. She suggested that Claimant go to Dr. Nelson because he was closer and could get Claimant in and out a lot quicker. It was hard to explain, because she was saying something about insurance covering this doctor or not covering Dr. Phillips. Based on that, Claimant started going to Dr. Nelson. He figured he needed to go to their physicians. He did not think Carrier recognized Dr. Phillips. She said that they did not recognize Dr. Phillips, and that they used Dr. Nelson on the West Bank. He figured that is where they wanted him to go, so that is where he went.

He completed the choice of physician form and sent it to Carrier.[45] He put down Dr. Nelson because he was told to. Colleen called him to help him fill the form out because he didn't understand some of it. Claimant explained to her that he went to Dr. Phillips but since Carrier recommended he go to Dr. Nelson, he needed to know how to fill out the form. Colleen said to put Phillips or Nelson on there. At that point he had seen Dr. Phillips one time and had not seen Dr. Nelson. He is not real sure of the dates, because

[45] EX-4.

it's been a while back. But, at the time that he filled the form out, he had not gone to Dr. Nelson. Claimant does not recall any additional conversations with Colleen about his medical treatment.

Dr. Nelson took some x-rays, and over several visits put Claimant in a hot tub with a whirlpool and put some warm towels behind his back. He also ordered an MRI and a CAT scan. After the MRI, Dr. Nelson referred Claimant to Dr. Culicchia. Dr. Culicchia conducted an examination in his office and told Claimant to go back to Dr. Nelson. Claimant underwent some physical therapy, which was making him worse. The therapist told Claimant to report that to Dr. Nelson, who stopped the physical therapy.

Dr. Nelson released Claimant to light duty, and Claimant tried, but worked about two hours and was bent over and crying. Mr. Bullias told him to go home. Claimant went back to Dr. Nelson, who again referred him to Dr. Culicchia. Dr. Culicchia shoved on Claimant's back and legs a little bit and told Claimant to go back to Dr. Nelson. He asked Dr. Culicchia about his condition, but Dr. Culicchia said Dr. Nelson would explain.

Claimant went back to Dr. Nelson, who referred him to Dr. Katz. Dr. Katz examined Claimant thoroughly, and had Claimant take a couple more tests. Dr. Katz also gave Claimant four injections in the small of his back. The injections made his back hurt worse. Dr. Katz wanted Claimant to go back to light duty. When Claimant explained the company was not going to let him work under light duty, Dr. Katz said to go back to regular duty, then. Claimant tried and worked about four hours that day, before telling Mr. Bullias he just could not do it. Claimant's back hurt so bad that he went home and took some pain pills, got in a hot tub of water, and just laid there.

Claimant called Carrier again and talked to Linda Allen about having tried to go back to work, but that he was hurting and needed to get reinstated on workmen's comp. Claimant also asked to be allowed to go back to Dr. Phillips. Claimant was told that Carrier was going to stop the case altogether and Claimant needed to get a lawyer. She said they could not reinstate Claimant's benefits because the doctor had signed him off. He thinks that was the last time he talked to her. Claimant then retained his current counsel and did not talk to Carrier again.

At that point he returned to Dr. Phillips, who was able to review the MRI that was taken and ordered by Dr. Nelson. Dr. Phillips said Claimant needed surgery.

Claimant also went to an independent medical examiner, Dr. Murphy, who was recommended by the Department of Labor. He also said Claimant needed the surgery, but was worried about Claimant's diabetes and recommended an EMG. By that time Dr. Phillips had retired and Dr. Adatto had taken over Claimant's cases. Dr. Adatto agreed with Dr. Murphy.

When the EMG was done, Dr. Adatto reviewed the results and said Claimant had a big bulging disc with a rip in it, with a hundred percent nerve damage and needed surgery. Claimant had the surgery with Dr. Adatto. His left leg eased off, but he feels like a there

is a softball in the small of his back, and constantly hurts from the small of his back to his legs. He gets sharp pains shooting through them. It is hard to sit any one way a certain length of time or lay or stand. It is just miserable.

At some point, Dr. Adatto discharged Claimant from his care and Claimant to pain management with Dr. Robert Lesser. Dr. Lesser put Claimant on some pain medicine that actually lets him sleep a few hours during the night and get up and move around to do what needs to be done. He sees Dr. Lesser every two to three months.

He still has shooting pains through his legs, back, and buttocks. He has burning constantly. The medicine does help it, and he can get up and do things. Every day is a fight for him to get up and just do the things he wants to do. He could not go back and do what he was doing when he was hurt. If he bends over a few times, his back hurts really bad. When blasting and painting, he was constantly stooping and climbing around stuff. He had to climb under it and squat. He can not pick up the weight he used to.

He cannot drive interstate tractor-trailers because of his diabetes, which has gotten worse since his injury because he cannot exercise. He cannot tolerate the bouncing or bind loads down.

He never hurt his back or legs before this accident. He has never filed a claim for workers' compensation other than the one for this injury. He cut off an index finger but had it sewed back on and went to work that afternoon. He lost a finger working on his truck at home on a Saturday but was at work Monday.

He currently gets $790.00 a month in Social Security disability. He has filled out a couple of job applications as a gas station cashier, but there was heavy lifting and standing for long periods of time and he felt like he was not qualified to do it. If he was offered rehabilitation services, he would actively cooperate and seek that.

He has thought about this a lot and wants to go back to work. He can make better money working. Physically, he knows he can't do it, but he would love to. He has thought about going to Winn Dixie or someplace like that. Every time he has checked, they told him flat-out that they would not hire him because of his back surgery.

Linda Allen testified live in pertinent part that:[46]

She is a senior claims representative for Carrier and has handled Claimant's file since late 2001 or early 2002, except for a period that she had left Carrier. She took over Claimant's file from Colleen McCoy. Carrier's policy is that claimants are allowed to choose one physician. It does not have a policy prohibiting the choice of Dr. Phillips, Dr. Adatto, or any other specific doctor. There is no conscious effort on Carrier's part to try to steer claimants away from treating with Dr. Phillips and his group. She has never told a claimant that they cannot choose a particular doctor, except if they wanted to treat outside

[46] Tr. 65-94.

the state, when she does inform them that they have to be in the geographic location.

She does not know what OMNET is, how it works, or how doctors join it. She is not certain, but does not believe Dr. Phillips, Dr. Adatto, Dr. McNally, or Dr. Watermeier are members of OMNET. Dr. Phillips is an orthopedist; Dr. Nelson is not. She believes that under the Act, claimants get one choice of physician, not each specialty.

She recalls the telephone conversation with Claimant after his benefits had been terminated. Claimant had earlier said he wanted to go back to work, and had been told he needed a full duty release. Once Claimant obtained that from Dr. Katz, his benefits were stopped. Then he called saying that he wanted his benefits reinstituted, but she explained that he had a full duty release from the doctor, and that she was unable to reinstate benefits. She does not advise claimants to obtain counsel and doubts very seriously if she told Claimant to get a "damn lawyer."

She did not receive any telephone calls or correspondence from Dr. Phillips or Dr. Adatto informing her that surgery was going to be performed in August of 2003. She did get all of the reports from Dr. Phillips prior to his retirement. The last report from either Dr. Phillips or Dr. Adatto was July 2002. Beyond that, she was not apprised of any of the developments or provided with any records from Dr. Phillips or Dr. Adatto. She was not aware that surgery was performed on Claimant in August of 2003.

When Carrier would not recognize Dr. Phillips and reimburse Claimant for the treatment, there was an informal conference. She took part in the informal conference with Claimant's counsel and the Department of Labor. Dr. Murphy was chosen as an independent medical examiner. Dr. Murphy wanted more testing such as an EMG and nerve conduction study and felt Claimant would not necessarily benefit from the surgery because of his diabetes. She does not recall paying for the tests. She was provided with Dr. Murphy's report and a subsequent EMG. Dr. Murphy indicated that if the EMG showed radiculopathy as opposed to polyneuropathy, surgery would be a reasonable alternative. She received nothing from Dr. Murphy after that.

She never received the medical reports documenting Claimant's surgery. Although, she did leave the company for a period of time and someone else handled the file.

She did see the EMG nerve conduction study report, but does not recall seeing any other medical reports after that. She does not recall a series of conversation in which Claimant's counsel attempted to have Carrier pay for the EMG. She does recall at some point telling Claimant's counsel Employer was controverting the claim on the basis that Claimant did not work for Employer, but for LA Tech and that Carrier had no further responsibility to Claimant.

CX-22 is a letter on 28 Jan 03 indicating that at that time, the claim was open for recovery and litigation purposes, but was closed for medical benefits, since Claimant was not an employee. Her portion of the claim was closed and she never received any more medical information from Claimant. When she closes a claim like that and does

subsequently get new medical information she reviews the information and decides whether to re-open the claim. Claims frequently get re-opened.

Employer's responses to a records production deposition in Claimant's civil action against Kostmayer state in pertinent part that:[47]

Claimant was never an employee of Employer. Employer had no employees engaged on the job on which Claimant was working. Anthony Bua represented Employer in the bid process, was responsible for Employer's recording and oversight of the job through Rolland Orgeron and Jimmy Bullias of La Tech.

On or about 1 Aug 01, Kostmayer Construction offered to pay $73,500.00 for all painting for the Belle Chase/Scarsdale ferry landings excluding shop painting of steel pipe and sheet pile, and landing barges, but including all field touch-up paint. The contract was amended on 22 Aug 01 to add blasting and painting metal rods at Kostmayer's yard. On 17 Sep 01, Employer paid $4,364.69 to La Tech as a subcontractor.

Employer has no documents or records relating to: Claimant being paid by Employer or La Tech; Claimant's fall from a ladder on 23 Oct 01; or Safety or other instructions concerning the job Claimant was engaged in at the time of his fall.

Kostmayer Construction's daily report for 23 Oct 01 states in pertinent part that:[48]

Kostmayer was working on the Belle Chase/Scarsdale ferry landings. Kostmayer had seven employees (one superintendent, five journeymen, and one laborer) and 13 subcontractor workers on the job (including two painters). Subcontractors were W. Barnes (running conduit), Rockport (compacting road base), and Titan painting (painting piles on Scarsdale side).

Wage and Hour Forms submitted to the Department of Labor by Jimmy Bullias state in pertinent part that:[49]

Jimmy Bullias paid or supervised the payment of Claimant for his work on 23 Oct 01. Claimant was employed by Employer as a painter at the Scarsdale ferry landing.

A certificate of liability coverage states in pertinent part that:[50]

Chailland Inc. was insured by the Employer Self Insurance Fund for workers compensation liability from 20 Jun 01 through at least 26 Feb 02. The policy covered employees of Louisiana Technical Services and named Employer as a certificate holder.

[47] CX-15.
[48] CX-16.
[49] CX-17.
[50] CX-18.

An affidavit by the administrator of the Employer Self Insurance Fund and an insurance policy obtained by Chailland Inc. effective 27 Jun 01 states in pertinent part that:[51]

> It is the only policy provided by the fund to Chailland Inc. It does not cover claims under the Act.

A certificate of liability coverage states in pertinent part that:[52]

> Louisiana Technical Services was insured by the Lumbermen's Underwriting Alliance for workers' compensation liability from 1 Apr 02 through 1 Apr 04. The policy covered employees of Chailland Inc. and named Employer as a certificate holder.

An affidavit by the administrator of the Lumbermen's Underwriting Alliance and insurance policy obtained by Louisiana Technical Services effective 1 Apr 02 states in pertinent part that:[53]

> It is the only policy provided by the alliance covering Louisiana Technical Services. It does not cover claims under the Act. It included alternate employers and named Chailland Inc. as the insured.

Communications from Employer to Steil Insurance Services states in pertinent part that:[54]

> Mr. Bua is a co-owner of Employer. This was Employer's first job for Kostmayer Construction. On or about 31 Jul 01, Employer sought insurance coverage for prepping and painting structures at Kostmayer's yard for 8 days and then touching up the Belle Chase/Scarsdale ferry landings for 4 days.

Administaff records state in pertinent part that:[55]

> It hired Claimant in January 2001 and provided him to Elder Offshore as a carpenter through August 2001.

Claimant's tax records for 2001 state in pertinent part that:[56]

> He earned $2,681.00 from Chailland Inc. and $20,710.00 from Administaff.

[51] CX-19.
[52] CX-20.
[53] CX-21.
[54] CX-23.
[55] CX-24.
[56] CX-25.

Claimant's pay records from Louisiana Technical Services state in pertinent part that:[57]

> In 2001 he earned $2,681.25 from Louisiana Technical Services.

Meadowcrest Hospital records state in pertinent part that:[58]

> On 23 Oct 01, Claimant presented complaining of back pain and reporting having fallen at work. He was x-rayed, treated with pain medications and released to return for a re-evaluation the next day.

Dr. Howard Nelson's records state in pertinent part that:[59]

> He first saw Claimant on 2 Nov 01. Claimant described his fall and subsequent treatment at Meadowcrest and with Dr. Phillips. Claimant complained of back and leg pain. Dr. Nelson noted Claimant's MRI showed protrusion and tear but no impingement. He assessed Claimant as having contusions and lower back strain. He prescribed medication and told Claimant to return on 6 Nov 01.
>
> Claimant missed the 6 Nov 01 appointment, but returned on 13 Nov 01, reporting no change. Dr. Nelson referred him to Dr. Culicchia.
>
> On 21 Nov 01, based on Dr. Culicchia's findings of no neurological problems, Dr. Nelson recommended physical therapy.
>
> On 26 Nov 01, Claimant reported doing better.
>
> On 10 Dec 01, Claimant reported slow improvement and Dr. Nelson released him to return to full duty.
>
> On 14 Dec 01, Claimant complained of worsening leg pain and weakness. Dr. Nelson sent him back to Dr. Culicchia.
>
> On 28 Dec 01, Claimant reported no change. Dr. Nelson restricted him to modified duty and limited lifting, bending, stooping, pushing, and squatting.
>
> On 18 Jan 02, Claimant reported no change. Dr. Nelson restricted him to modified duty and limited lifting, bending, stooping, pushing, and squatting. Claimant continued physical therapy.
>
> On 22 Jan 02, Claimant reported no change. Dr. Nelson restricted him to modified duty and limited lifting, bending, stooping, pushing, and squatting.

[57] CX-26.
[58] C-8.
[59] EX-6.

On 30 Jan 02, Claimant reported symptoms worsening after a sneeze. Claimant continued physical therapy.

On 4 Feb 02, Claimant reported worsening symptoms. Claimant continued physical therapy.

Dr. Frank Culicchia's records state in pertinent part that:[60]

He first saw Claimant on referral from Dr. Nelson on 21 Nov 01. He took a history and examined Claimant. Claimant had a negative straight leg raise test. He reviewed Claimant's 2 Nov 01 MRI and noted that while there was a bulge at L5-S1, it showed no contact of the thecal sac or nerve roots. He opined that Claimant's symptoms were not related to bulge at L5-S1, but were mechanical in nature.

He saw Claimant again on 21 Dec 01 on referral from Dr. Nelson. He took another history, re-examined Claimant, and again reviewed the MRI. He did not change his initial assessment and recommended physical therapy.

Dr. Ralph Katz's records state in pertinent part that:[61]

He first saw Claimant on 7 Feb 02. Claimant returned on 6 Mar 02 for a follow up visit. Claimant complained of lower back pain. He assessed Claimant as suffering from mechanical low back pain and coccydynia and recommended conservative treatment. He cleared Claimant for light duty starting 18 Mar 02.

Diagnostic Imaging Services records state in pertinent part that:[62]

A bone scan of Claimant on 11 Feb 02 was normal.

Dr. Stuart Phillips' records state in pertinent part that:[63]

He first saw Claimant on 29 Oct 01. Claimant described his fall at work and complained of severe back pain radiating into the legs. Dr. Phillips conducted an examination. Claimant had very limited range of motion, muscle weakness, abnormal straight leg tests, and positive Patrick's test. An x-ray taken showed moderate degenerative changes throughout the lumbar spine. Dr. Phillips assessed Claimant as having a possible lower lumbar disc herniation and recommended an immediate MRI. Claimant was given pain medications and taken off all work through 5 Nov 01.

On 25 Jul 02, Dr. Philips reviewed the MRI and determined it showed a large herniated

[60] EX-2.
[61] EX-1.
[62] EX-5.
[63] CX-9.

disc at the lumbosacral level. It was large enough to impinge the thecal sac and endanger the nerve root. It was consistent with Claimant's symptoms on examination and interfering with function. Dr. Phillips believed conservative treatment would not help and Claimant was a candidate for surgery. He deemed Claimant totally disabled until the surgery.

On 3 Dec 02, Dr. Phillips opined that the EMG ordered by Dr. Murphy was an important diagnostic that should have been done before. He noted Claimant continued to be in severe pain and totally disabled. In the absence of a diabetic condition that would contraindicate it, he believed surgery was appropriate. In view of his imminent retirement, Dr. Phillips referred Claimant to Dr. Adatto for future care.

MRI of Louisiana records show in pertinent part that:[64]

Claimant's lumbar spine MRI on 2 Nov 01 revealed elements of degenerative changes at L5-S1 and a posterior disc bulge and annular tear at L5-S1 with no definitive nerve root contact.

Dr. Kenneth Adatto's records state in pertinent part that:[65]

He saw Claimant starting on 2 Jan 03. He examined Claimant, but wanted to see the MRI and Dr. Murphy's report before recommending surgery. In the meantime, he agreed that Claimant was totally disabled.

On 30 Jan 03, Dr. Adatto saw Claimant and reviewed Dr. Murphy's report. He agreed that an EMG would provide better information upon which to base a surgical decision. He also agreed that the diabetes could make Claimant a poor candidate for surgery. He continued Claimant as totally disabled.

On 30 Mar 03 he saw Claimant and reviewed the EMG results. He determined they confirmed that Claimant's problems were localized to one level and consistent with his complaints. He discussed the risks and benefits of surgery with Claimant. Dr. Addato informed Claimant that surgery would not change his ability to function; it would only address his pain. Claimant would remain with a total permanent spinal disability. He would have to avoid repetitive stooping, bending, and lifting of objects weighing more than 25-50 pounds. He would not be able to stay seated or standing for more than about 45 minutes at one time without moving around.

On 6 Aug 03, Claimant underwent an anterior lumbar fusion at St. Charles General Hospital.[66]

On 8 Sep 03, he saw Claimant, who complained of pain and stiffness. Dr. Adatto noted that the hardware from Claimant's surgery appeared to be in good alignment. He

[64] CX-40.
[65] CX-10.
[66] CX-13.

explained to Claimant that surgery no longer offered any promise and Claimant should be followed for pain management. He assessed Claimant as having total permanent spinal disability.

On 23 Dec 03, he saw Claimant for chronic pain management. Dr. Adatto prescribed exercise and pain medication. He assessed Claimant as having a 10-15% impairment of the lumbar spine. He limited Claimant from repetitive stooping, bending, and lifting of objects weighing more than 10-20 pounds or staying seated or standing for more than about 45 minutes at one time without moving around.

On 15 Apr 04, Claimant returned. Dr. Adatto prescribed exercise and pain medication. He assessed Claimant as having a 10-15% impairment of the lumbar spine. He limited Claimant from repetitive stooping, bending, and lifting of objects weighing more than 10-20 pounds or staying seated or standing for more than about 45 minutes at one time without moving around.

On 7 Sep 04, Claimant returned. Dr. Adatto prescribed exercise and pain medication. He assessed Claimant as having a 10-15% impairment of the lumbar spine. He limited Claimant from repetitive stooping, bending, and lifting of objects weighing more than 10-20 pounds or staying seated or standing for more than about 45 minutes at one time without moving around.

Claimant's choice of physician form and related correspondence shows in pertinent part that:[67]

Carrier mailed a choice of physician form to Claimant on or about 2 Nov 01. Claimant put both Dr. Phillips and Dr. Nelson on the form. He also indicated his physician specializes in orthopedic.

Letters by Claimant's counsel to Linda Allen show in pertinent part that:[68]

On 23 Apr 02, Claimant's counsel informed Carrier that Claimant's choice of physician had always been Dr. Phillips and requested authorization to treat with him.

On 18 Jun 02, Claimant's counsel provided Carrier with records of Dr. Phillips' 29 Oct 01 and 2 May 02 examinations of Claimant.

On 21 Jun 02, Claimant's counsel provided Carrier with records of Dr. Phillips' 13 Jun 02 examination of Claimant.

On 28 Aug 02, Claimant's counsel provided Carrier with records of Dr. Phillips' 20 Jun 02 and 25 Jul 02 examinations of Claimant.

[67] CX-2; EX-4.
[68] CX-3.

A Memorandum of Informal Conference states in pertinent part that:[69]

> On 23 Sep 02, Claimant sought to have Dr. Phillips as his choice of physician.

Dr. George Murphy's report states in pertinent part that:[70]

> Both Claimant and Carrier agreed to have him conduct an independent medical evaluation (IME) of Claimant. He conducted the evaluation on 31 Oct 02 and determined Claimant had a degenerated herniated L5-S1 disc. Based on his review of the MRI, bone scan, and examination of Claimant, Dr, Murphy recommended an EMG and nerve conduction study. If Claimant demonstrated radiculopathy with minimal or no peripheral neuropathy, surgery could be a reasonable alternative. If Claimant showed minimal or no radiculopathy, but considerable peripheral neuropathy, surgery was unlikely to help. Claimant's status as a diabetic would give him a poorer outlook.

Dr. Daniel Trahant's report states in pertinent part that:[71]

> An EMG performed on 20 Mar 03 showed Claimant had chronic pathology in the S1 roots bilaterally and latencies compatible with mild sensory neuropathy.

ANALYSIS

Employee/Employer Relationship

There is no presumption applicable to this issue and Claimant must establish by a preponderance of the evidence that there existed an employer/employee relationship or an alternate basis for employer liability under the Act.

Claimant's testimony is most probative in that it shows he believed he had been hired and was working for LA Tech. The person who hired him and his immediate boss was an LA Tech employee. While he also mentioned that when he moved to the landing he was told he was working for Employer, but he really did not care. He just followed the orders he got from a Kostmayer employee. His reference to a pay printout with Titan Maintenance on it is not as probative as the documents actually submitted.

On the other hand, Employer's submissions in the civil suit are highly probative. Employer's co-owner, Anthony Bua stated Employer had no employees on the landing. Kostmayer contracted with Employer to do the work on the landing. Employer in turn hired LA Tech as a subcontractor. Employer exercised control and oversight of LA Tech through Jimmy Bullias. That is consistent with Kostmayer's daily report for the date of Claimant's injury, which

[69] CX-4 (was considered only its propensity to show what was discussed not for any substantive purpose based on the recommendations made therein).
[70] CX-5-6.
[71] CX-7.

showed Employer as a subcontractor doing painting and two subcontractor painters on the job.

Claimant's status as a LA Tech employee is further corroborated by his tax and pay records which indicate he drew pay in 2001 from Administaff and Chailland. The Administaff pay was from Elder Offshore. The Chailland pay was $2,681.00, which is essentially the $2681.25 reflected in LA Tech records. [72]

Thus, the preponderance of the evidence clearly establishes that Claimant was an employee of LA Tech at the time he was injured and that LA Tech was a subcontractor for Employer. The certificates and affidavits submitted clearly establish that neither LA Tech nor Chailland secured the payment of compensation under the Act. Accordingly, Employer is liable for and required to secure the payment of compensation.

Notice

The Act presumes that proper and timely notice was given. However, even in the absence of the presumption, Claimant would prevail on that issue. Anthony Bua, a co-owner of Employer, was responsible for oversight and control of LA Tech's work through Jimmy Bullias. Bullias was immediately notified by Claimant of the injury. Mr. Bullias subsequently contacted Carrier when it appeared that Claimant's medical expenses were going to be larger than expected. Carrier sent Claimant a choice of physician form on or about 2 Nov 01 and Claimant was seen by Dr. Nelson on 2 Nov 01. There is no question that both Bullias, who appears to have been Employer's agent, and Carrier knew about the injury well with 30 days of the injury.

Even if that were not the case, Employer has offered no suggestion that it was prejudiced in its ability to investigate, which is not surprising, since its carrier knew about the injury within a few days.

Consequently, the record demonstrates no basis to conclude that notice was not given and Employer was thereby prejudiced.

Causation, Nature and Extent

The parties dispute Claimant's status following his release by Dr. Katz on 2 Apr 02. Claimant testified that Dr. Katz only wanted Claimant to go back to light duty, but when Claimant explained the company was not going to let him work light duty, Dr. Katz acquiesced and cleared him for regular duty. Claimant says he tried to go back, but could not work even a full day. The records from Dr. Katz's offered by Employer into evidence are incomplete and unclear on the subject, although they do include a work slip releasing Claimant to regular duty. They do not rebut Claimant's version of how he came to be released by Dr. Katz.

[72] While Jimmy Bullias certified on DOL wage and hour forms that Claimant was an employee of Employer, that would not be inconsistent with what he told Claimant, but also not particularly credible given the motive to keep employees working under Longshore conditions of LA Tech's books.

Dr. Nelson's records indicate he does not believe Claimant suffered from any more than a lumbosacral strain with underlying degenerative disc disease. However, except for a short period in December 2001, there is no indication that he cleared Claimant to full duty. Likewise, Dr. Culicchia opined that Claimant's problems were mechanical in nature and not attributable to the bulge at L5-S1. However, he was silent on Claimant's ability to return to work.

On the other hand, Dr. Phillips and Dr. Adatto were Claimant's treating physicians and followed Claimant for a much longer period. They believed the bulge was related to his fall, responsible at least in part for his symptoms and was an appropriate condition for surgical intervention. Both were also clear that Claimant could not and can not return to his original job.

Dr. Murphy felt that if an EMG showed radiculopathy with minimal or no peripheral neuropathy, surgery would be reasonable. He offered no opinion on Claimant's ability to work. Dr. Addato agreed with Dr. Murphy and delayed his surgical decision until the EMG confirmed his assessment.

Based on his status as a treating physician, the fact that he (and Dr. Phillips) had a much longer period over which to follow Claimant and the fact that Dr. Adatto was consistent with Dr. Murphy, I find their opinions to be more credible.

Therefore I find that Claimant's fall led either directly or by weigh of aggravation of pre-existing degenerative disc disease to a disc bulge and injury which has prevented him from returning to his original job. Since Employer offered no evidence of SAE, Claimant has been totally disabled since his injury and remains so.

Choice of Physician/Medical Care

Claimant was confused at the time he completed the choice of physician form. He was told that he could choose either Dr. Nelson or Dr. Phillips, but that Dr. Nelson was a better choice since he was in Carrier's group and getting appointments would be easier. He was not told he had a choice of specialist. He put both doctors down (and noted that Dr. Phillips was an orthopedist). Nonetheless, he acquiesced to the Carrier's suggestion and did not return to Dr. Phillips, but saw Dr. Nelson/Dr. Culicchia for an extended period. It was only in April 2002, after Dr. Katz cleared him to regular duty (at Claimant's request), he was unable to work, and Carrier refused to reinstate benefits, that he sought to return to Dr. Phillips.

By 23 Apr 02, Claimant had retained counsel, who had by letter notified Carrier of his request to treat with Dr. Phillips and followed up with medical reports on Claimant from Dr. Philips. That led to an informal conference on the matter in September 2002. By January 2003, Carrier had determined that since Claimant was not an employee of Employer it considered the file closed for medical and disability payments.

Given that Claimant did not attempt or request to see Dr. Phillips until after benefits were stopped, the record indicates that he did by acquiescence exercise his choice of Dr. Nelson

initially. However, he was also entitled to a choice of specialist. Dr. Nelson was not an orthopedist, but Dr. Phillips was. Therefore, when Claimant, through his attorney requested authorization to see a specialist (Dr. Phillips) it should have been granted. Carrier's failure to grant that authorization, along with its previous notice of its belief that that Claimant was no longer disabled clearly were sufficient to be a refusal and lift the requirement that Claimant seek authorization. Its subsequent decision to close the file based on Claimant's employee status, serves to further corroborate that finding.

Thus, although Dr. Nelson was Claimant's choice of physician through April 2002, after that time he was entitled to see an orthopedic specialist of his choice. That was denied by Carrier. Consequently, Carrier cannot cite lack of authorization as a defense to liability for reasonable and necessary medical expenses related to the fall.

In as much as Dr. Phillips and Dr. Adatto were qualified physicians indicating treatment was necessary for a work-related condition Claimant has established a *prima facie* case for compensability. Since they were Claimant's treating physicians, had the longest period to follow Claimant, and were consistent with Dr. Murphy, I give their opinions greater weight.

Consequently I find that the treatment for Claimant's back recommended by and obtained through Dr. Phillips and Dr. Adatto was reasonable, necessary, and appropriate and that Claimant did not fail to seek authorization for that treatment until such time as treatment had already been refused.

However, the record does not indicate that the reports of Claimant's treatment with Dr. Adatto or Dr. Phillips were filed in accordance with the statute and regulations. Claimant's suggestion that Employer was not thereby prejudiced and would have taken no different action may or may not be accurate, but is a determination for the District Director to make in his decision as to whether there is good cause to excuse the failure to file the reports.[73]

ORDER AND DECISION

1. Claimant injured his back in the course and scope of Longshore employment with Employer on 23 Oct 01. His average weekly wage at the time of his injury was $583.13.

2. Claimant was employed by Louisiana Technical Services, a sub-contractor for Employer. Louisiana Technical Services failed to secure the payment of compensation under the Act.

[73] Based on the status of the case and Carrier's determination by the time of the surgery that Claimant was not an employee, I would find Employer was not prejudiced by the failure.

3. Claimant was temporarily totally disabled from the date of his injury to 7 Sep 04, at which date he reached maximum medical improvement and became permanently totally disabled.

4. Employer shall pay to Claimant temporary total disability benefits from 24 Oct 01 through 7 Sep 04, based on an average weekly wage of $583.13.

5. Employer shall pay to Claimant permanent total disability benefits from 8 Sep 04 to present and continuing, based on an average weekly wage of $583.13.

6. The case is hereby returned to the District Director for a determination of whether there was good cause for the providers' failure to file their initial report with the District Director and Employer within 10 days of first treatment.

   i. Should the District Director find good cause, Employer shall reimburse Claimant for all treatment provided or prescribed by Dr. Phillips and Dr. Adatto.
   ii. Should the District Director find no good cause, Claimant's claim for prior medical care is denied.

7. Employer shall provide Claimant medical pain management care associated with his back injury.

8. Employer shall receive credit for all compensation heretofore paid, as and when paid.

9. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.[74]

[74] Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al*., 16 BRBS 267 (1984)

10. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

11. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[75] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

SO ORDERED.

PATRICK M. ROSENOW
Administrative Law Judge

[75] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **30 Jan 06**, the date this matter was referred from the District Director.